

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

GREGORY S. UNDERWOOD,
Claimant Below, Petitioner

vs.) No. 100835 (BOR Appeal No. 2044012)
(Claim No. 2008016327)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

REMINGTON, LLC,
Employer Below, Respondent

FILED
June 9, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 3, 2010, in which the Board affirmed a January 8, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 19, 2008 Order granting a 7% permanent partial disability award. The appeal was timely filed by the petitioner, and a response was filed by Remington, LLC. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the grant of a 7% permanent partial disability award. Mr. Underwood contends that Victor Poletajev's report, which found 33% impairment,

should have been accorded more evidentiary weight despite being in conflict with the other evaluating physicians' reports. Mr. Underwood argues that there is nothing in the record showing Dr. Poletajev's findings to be incorrect.

The Office of Judges reviewed the reports of the physicians who conducted independent medical evaluations: Dr. Saghir Mir; Dr. Poletajev, a chiropractic physician; and Dr. Michael Condaras, a chiropractic physician. (Jan. 8, 2010 Office of Judges Order, pps. 1-3.) Dr. Mir and Dr. Condaras found 7% whole person impairment and 8% whole person impairment respectively. *Id.* at pps. 2-3. Dr. Poletajev, however, found 33% impairment. *Id.* at p. 2. The Office of Judges found that Dr. Poletajev's loss of motion findings were not replicated either during the exam preceding Dr. Poletajev's, which was performed by Dr. Mir, or during Dr. Condaras's subsequent evaluation. *Id.* at p. 4. Accordingly, the Office of Judges found that "whatever disability Dr. Poletajev may have found was not permanent in nature and therefore not a reliable estimate of the claimant's permanent impairment due to the subject compensable injury." *Id.*

Noting the similarity between Dr. Mir's and Dr. Condaras's findings, the Office of Judges ultimately found Dr. Mir's report to be the most reliable due to Dr. Condaras's erroneous failure to apply Table 75 of the *AMA Guides* in calculating Mr. Underwood's cervical spine impairment. *Id.* The Office of Judges stated that "[t]here is not found to be an appropriate reason to disregard Table 75 findings for cervical injury simply because there has been a prior cervical permanent partial disability award in another claim." *Id.* Thus, the Office of Judges affirmed the claims administrator's grant of a 7% permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 3, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of a 7% permanent partial disability award is affirmed.

Affirmed.

ISSUED: June 9, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh